Supreme Court, U.S.
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Nos. 99-1507 and 99-1530

IN THE

Supreme Court of the United States

LARRY DUNN, TOM DUCKWORTH, *et al.*,
Petitioners,

v.

AIR LINE PILOTS ASSOCIATION,
HENRY DUFFY, *et al.*,
Respondents.

JOSEPH S. NORMAN, II.
Petitioner,

v.

AIR LINE PILOTS ASSOCIATION,
HENRY DUFFY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly concluded that petitioners—all of whom admittedly crossed their union's picket lines in the massive pilot sympathy strike at Eastern Air Lines, Inc. in 1989—could not sustain a libel action for being called "scabs" because (1) the description was not false and (2) there was no clear and convincing evidence of actual malice on the part of respondents?

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BRIEF IN OPPOSITION OF RESPONDENTS AIR LINE PILOTS ASSOCIATION, *HENRY DUFFY AND J. RANDOLPH BABBITT*

Respondents Air Line Pilots Association ("ALPA") and its past presidents Henry Duffy and J. Randolph Babbitt (collectively "the ALPA Respondents")[1] submit this brief in opposition to the petitions for writ of certiorari filed by Petitioners Larry Dunn et al. (No. 99-1507) ("Dunn Pet.") and *pro se* Petitioner Joseph S. Norman II (No. 99-1530) ("Norman Pet.").

STATEMENT OF THE CASE

A. ALPA is a labor union that represents pilots at a number of commercial airlines. APP. 2.[2] At each airline, an ALPA Master Executive Council ("MEC") of elected pilot representatives from that airline makes union policy decisions relating to that company. *Id.*

In early 1989, Eastern Air Lines, Inc. ("Eastern") reached impasse in its labor contract negotiations with the International Association of Machinists ("IAM"). APP. 2. The Eastern MEC was charged by ALPA's longstanding strike policy with the responsibility of determining whether to direct Eastern pilots to honor or to cross any picket lines established by the IAM. In particular, ALPA's Administrative Manual (which codifies ALPA's longstanding interpretation of ALPA's Constitution and Strike Policy) explicitly provides that "[t]he decision to honor or not honor picket lines of other crafts shall be left to the discretion of the President and the MEC of the carrier involved." APP. 20; *see also Eastern* v. *ALPA*, 710 F. Supp. 1342, 1348 n.13 (S.D.

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[1]The remaining individual respondents are filing a separate brief in opposition to the petitions.

[2]"APP." citations in this brief are to the opinions of the courts below annexed to the petition for a writ of certiorari.

Fla.) (explaining ALPA's procedure for calling a sympathy strike), *aff'd*, 136 L.R.R.M. (BNA) 2392 (11th Cir. 1989).

The Eastern MEC met in February, 1989 and adopted a formal resolution declaring the MEC's intention to direct pilots to honor IAM picket lines in the event of an IAM strike. APP.2.[1] The MEC also directed the MEC officers to survey the membership to measure pilot support for a sympathy strike to provide further guidance to the MEC in its strike deliberations. *Id.* On February 16, 1989, MEC Chairman Bavis sent a letter to each Eastern pilot enclosing a copy of the MEC resolution expressing support for the IAM. APP. 2-3. The following day, the Eastern MEC sent a "ballot poll card" to each Eastern pilot. APP.3. Nearly seventy-five percent of the 2,615 pilots who returned the ballot poll cards responded that they would honor IAM picket lines outright or would support the MEC's decision to call a sympathy strike. *Id.*

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[1]At that meeting, the Eastern MEC reviewed three years of Eastern Chairman Frank Lorenzo's destructive behavior towards the airline and its employees, including Eastern's attempt to repudiate the 1986 pilot collective bargaining agreement, *see Eastern Air Lines, Inc.* v. *Air Lines Pilots Ass'n*, 861 F.2d at 1548-49 (11th Cir. 1988); its attempt to transfer Eastern's Air Shuttle to a non-union subsidiary owned and managed by Lorenzo, *see Air Line Pilots Ass'n* v. *Eastern Air Lines*, 849 F.2d 1481, 1481-82 (D.C. Cir. 1988); and its elimination of more than 20 percent of Eastern's operations and transfer of substantial Eastern work, routes and assets to Lorenzo's non-union Continental Airlines, Inc., *see International Ass'n of Machanists* v. *Eastern Air Lines*, 703 F. Supp. 962, 966-99 (D.D.C.), *rev'd*, 863 F.2d 891 (D.C. Cir. 1988). The MEC also reviewed ALPA's experience with Lorenzo under similar circumstances at Continental in 1983 when ALPA failed to honor IAM picket lines, and management quickly broke the IAM strike, forced the Continental pilots on strike, permanently replaced the striking pilots and withdrew recognition from ALPA. *See generally Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65, 68 (1991). Ultimately, and largely based upon the miserable Eastern experience, the U.S. Department of Transportation indefinitely barred Lorenzo from the airline industry. *See ATX, Inc.* v. *U.S. Dept. of Transp.*, 41 F.3d 1522, 1530-32 (D.C. Cir. 1994).

The Eastern MEC met again on March 1, 1989. *Id.* After reviewing the results of the pilot survey that affirmed the MEC's position and a last minute telephone poll of the pilot group that revealed even stronger pilot support for a pilot sympathy strike, the MEC unanimously adopted a resolution "that all Eastern Air Lines pilots shall honor the International Association of Machinists picket lines and shall refuse to cross picket lines and that all pilots shall refrain from performing any work for EAL during the strike." *Id.* On March 4, 1989, the IAM struck Eastern, and ALPA commenced its sympathy strike. *Id.* Over ninety percent of approximately 3400 Eastern pilots initially joined the sympathy strike and respected the pilot picket lines. *Id.*

B. To continue operations, Eastern embarked on an aggressive plan to lure pilots to cross ALPA picket lines by promising pilots who abandoned the strike that they would receive promotions to higher paying pilot positions by permanently displacing strikers from their pre-strike pilot positions. *Id.* In response, on March 28, 1989, the Eastern MEC unanimously adopted a formal resolution to "publish a finalized list of strikebreaking pilots at the conclusion of the ALPA sympathy strike" and to bring internal union charges under ALPA's constitution against ALPA members who crossed the pilot picket lines. *Id.* Individuals were placed on this list of working pilots only upon receipt of two confirmed reports that the pilot crossed ALPA picket lines, and after being provided with an opportunity to refute the allegation that they had crossed the pilot picket lines to fly for Eastern. APP. 3-4. Additionally, the Eastern MEC, the strike operations committee and striking pilots repeatedly advised working pilots that the union would regard them as strikebreakers or "scabs" if they crossed ALPA's picket lines. APP. 4. On July 31, 1989, for example, an MEC strike committee report reminded pilots that "[a] pilot becomes [a] scab at [the] moment he signs to go back to work." *Id.*

C. By the summer of 1989, the Eastern MEC was engaged in an internal debate over whether to continue the pilot sympathy strike. *Id.* On August 1, 1989, the MEC convened and reviewed the situation for five consecutive days. *Id.* After substantial discussion, and two "straw" polls of the MEC members showing that a majority favored continuing the sympathy strike, the MEC unanimously passed a resolution to continue the sympathy strike pending membership meetings at each local pilot base. *Id.* The first local pilot meeting was in Miami, on August 6, 1989, with audio hookup to other cities. *Id.* Though the parties do not agree on all that was said at that meeting, it is undisputed that the August 6 meeting concluded with the Miami-based Eastern pilots voting overwhelmingly, by a show of hands, to continue the sympathy strike. APP. 4-5. Similar meetings held at other cities throughout the Eastern system concluded (with one exception) with membership votes overwhelmingly in favor of continuing the sympathy strike. The Eastern MEC then passed another resolution continuing the sympathy strike, and the decision was promptly transmitted to all Eastern pilots and reiterated until the termination of the sympathy strike on November 22, 1989. APP. 5.

Petitioners, and other pilots who crossed ALPA picket lines at Eastern between March 4 and November 22, 1989, were placed on a "scabs" list that was later published under the title "The Scabs of Eastern of the Strike of 89," with a full quote of Jack London's "Ode To A Scab". APP. 5.

D. After Eastern terminated operations in 1991, petitioners filed suit against ALPA and the individual respondents, alleging, *inter alia*, that the publication of the "scabs" list constituted libel.[4] The district court granted summary

[4]The suit, originally filed in Florida circuit court, was removed to federal court based on duty of fair representation claims which are governed by federal law. *See Air Line Pilot Ass'n v. O'Neill*, 499 U.S. 65 (1991); 28 U.S.C. §1441 (1994). The suit, as amended three times, also

judgment to respondents on the libel claims, concluding that petitioners had not shown that the "scabs" list was false or that there was evidence of actual malice, APP.62-91, and the court of appeals affirmed. APP. 32.[3]

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE DECISION BELOW IS FULLY CONSISTENT WITH THE OPINIONS OF THE COURT AND DOES NOT MERIT SUPREME COURT REVIEW

A petition for a writ of certiorari will be granted "only for compelling reasons," Sup. Ct. R. 10, such as when a decision of a court of appeals is "in conflict with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a), or when a court of appeals "has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Here, no compelling reason exists for granting the writ. The decision of the court below did not conflict with any decision of any other court of appeals and petitioners do not so contend. Nor did the court below "decide[ ] an important question of federal law that has not been, but should be, settled by this Court." Indeed, far from deciding an important question of law, the court below merely applied the legal standard for libel in labor disputes cases—a standard already well-established by the Court—to the undisputed facts of the case.

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included a state law claim for tortious interference with business relationships. APP. 1-2, 7-8.

[3]The court of appeals also affirmed the district court's dismissal of the state law tortious interference claim for failure to state a claim for relief. APP. 2. Petitioners did not appeal the district court's decision granting summary judgment to respondents on petitioners' duty of fair representation claim. APP. 87-91.

The Court has established that federal labor law partially preempts state libel law because national labor policy favors free speech and robust debate in labor disputes. *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 273 (1974); *Linn* v. *United Plant Guard Workers Local 114*, 383 U.S. 53, 57-58 (1966). Accordingly, a defamatory statement published in the context of a labor dispute is actionable only if a plaintiff proves that a libelous false statement was made with "actual malice". *Linn*, 383 U.S. at 65; *Letter Carriers*, 418 U.S. at 273-281. Actual malice must be established by clear and convincing proof that the speaker made the statement with knowledge that it was false or reckless disregard of the truth. *Letter Carriers*, 418 U.S. at 281, (quoting test of *New York Times* v. *Sullivan*, 376 U.S. 254, 280, 285-86 (1964)); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). The Court has explained that falsity must be examined from the perspective of a reasonable reader. *Letter Carriers*, 418 U.S. at 285-86 (adopting analysis developed earlier in *Greenbelt Cooperative Publishing Association* v. *Bressler*, 398 U.S. 6 (1970) and later applied in *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 515, 517 (1991)).

The court below carefully reviewed and scrupulously applied the Court's settled precedent here. APP. 9-32. The appeals court looked to common definitions of a "scab" in the labor context as "one who refuses to strike or returns to work before a strike has ended." APP. 14 (*quoting* Websters Third New International Dictionary 2022 (1986); *see also id.* ("scab is a worker who accepts employment or replaces a union worker during a strike"); APP. 82 (district court's citation to Webster's New Collegiate Dictionary 1021 (1979)) (scab is "one who works for less than union wages or on non union terms."). The appeals court correctly determined that the scab designation in this case was factually true under these commonly understood definitions because the petitioners

admit they crossed picket lines to work during the 1989 sympathy strike. APP. 14-15, 82. *Compare Letter Carriers*, 418 U.S. at 283 (similarly applying a common, dictionary definition of "scab"). Summary judgment against petitioners' libel claims was thus proper for failure to show falsity. APP. 14-15.

The court additionally held that petitioners' libel claims failed as a matter of law for the independent reason that petitioners failed to produce any (much less clear and convincing) evidence of actual malice on the part of respondents. APP. 24-26. It is undisputed that ALPA promptly and vigorously prosecuted internal union charges against ALPA members who crossed the picket lines, APP. 87, and each individual respondent testified without contradiction that he considered the pilots who crossed ALPA's picket lines to be "scabs" because they abandoned the ALPA sympathy strike, took the jobs of striking pilots, and sided with Eastern management during the strike. APP. 25. There was no evidence that respondents subjectively believed the scab designation for petitioners was false or acted with reckless disregard of the truth because of the procedures used to call the strike. *Id.* To the contrary, the respondents testified without contradiction that they believed that the sympathy strike was properly initiated by ALPA's President and the Eastern MEC and based their belief on ALPA's thirty-year-old written policy and longstanding practice of initiating sympathy strikes without a formal membership vote. APP. 26.

Likewise, the court held that there was no clear and convincing evidence that respondents seriously doubted the scab designation for petitioners who crossed ALPA's picket lines after August 6—and repeatedly until November 22—1989. It is undisputed that the August 6 meeting in Miami and all other cities (except one small station) concluded with overwhelming membership votes to continue the sympathy

strike and that the MEC then voted and rejected the option of terminating the sympathy strike. APP. 28. It is also undisputed that ALPA, the Eastern MEC, and the strike committee promptly notified every Eastern pilot of this decision, repeatedly reiterated the direction to remain on strike and maintained pilot picket lines throughout the Eastern system until November 22, 1989. *Id.* The actual malice test focuses on what defendants (not plaintiffs) subjectively knew, *Masson*, 501 U.S. at 510; *St. Amant* v. *Thompson*, 390 U.S. at 731, and the court of appeals properly concluded that under these undisputed facts petitioners could not prove that respondents believed that the "scab" label was false or acted with reckless disregard of the truth. APP. 29-30. These dispositive rulings by the court of appeals scrupulously apply settled law to undisputed facts and do not merit review by the Court. Sup. Ct. R.10.

The appeals court's rejection of the petitioners' novel theory that federal preemption of libel claims can be avoided based on a *post hoc* procedural challenge to the union's decision to strike[6] likewise does not present an important question that should be settled by the Court. Sup. Ct. R.10. This determination was not necessary to the outcome of this case since the appeals court held, correctly, that ALPA properly called the sympathy strike in a manner consistent with its constitution and other governing documents and over thirty years of practice. APP. 18-21. Nevertheless, the conclusion by the court below on petitioners' unsupported theory is in complete accord with the Court's ample precedent. The appeals court explained that this argument

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[6]The court of appeals correctly observed that during the entire course of the 1989 sympathy strike no ALPA member sought an injunction to halt the strike as illegally called under ALPA's constitution. APP. 17, 25. Indeed, it was not until petitioners commenced this litigation in late 1991 (over two years after the sympathy strike was over) that any pilot proceeded to court on a claim that the sympathy strike was illegally called.

"misses the whole point of *Letter Carriers*, *Linn* and *Bressler's* mandates to consider the surrounding circumstances – and reasonable understanding of the supposedly defamatory remarks and not the strictly legalistic or literal interpretation of the words used." APP. 15. The court observed that the reasonable reader of the "scab" list in this case would view it in the context of a massive union work stoppage, with union picket lines, over ninety percent compliance initially, and subsequent votes by an overwhelming majority of the membership to continue the strike called by the union leadership. APP. 15-16. A reasonable reader of the scab list would thus understand it simply as an accusation that those pilots returned to work across union picket lines during the 1989 work stoppage, the appeals court ruled, and not as a certification that the strike complied with internal union procedures. APP. 17. The court's decision rejecting petitioners' novel theory here does not merit Supreme Court review.

Apart from their novel theory, the *Dunn* petitioners seek this Court's review of what amount to no more than the appeals court's findings on narrow fact-based questions—whether ALPA followed proper procedures in calling the sympathy strike, Dunn Pet. 21-24; whether ALPA instructed the pilots to break ranks and go back to work on August 6, 1989, Dunn Pet. 28-29; and whether ALPA's officers subjectively believed petitioners fit the definition of a "scab", Dunn Pet. 24-29. Such assertions of "erroneous factual findings" do not constitute grounds for this Court's review, Sup. Ct. R. 10; these matters have no significance beyond the instant action. In any event, the court's findings were correct.

The court correctly determined that the sympathy strike was properly called by the Eastern MEC and ALPA's President in accordance with the ALPA Administrative Manual's longstanding provision specific to sympathy strikes, as consistently applied by ALPA for over thirty years, and which did not conflict with more general provisions in ALPA's

constitution which do not specifically reference sympathy strikes and which have been interpreted for decades to apply to membership votes in only primary strikes. APP. 18-24.[7] The court was likewise correct in determining that no reasonable jury could find that ALPA terminated the strike or instructed the pilots to break ranks and go back to work in August, 1989. APP. 26-30. Instead, according to undisputed facts, the meetings that began on August 6 ended with membership votes overwhelmingly in favor of continuing the strike; the Eastern MEC voted not to return to work; ALPA's President, the Eastern MEC and the strike committee advised the pilots that the strike continued and repeatedly instructed all pilots to remain on strike; and pilot picket lines continued throughout the Eastern system until November 22, 1989. *Id.* The court was also correct in its determination that there was no (much less clear and convincing) evidence of actual malice on the part of respondents. APP. 24-26. That finding by the court below is supported by respondents' unrebutted testimony that ALPA and its officials subjectively believed that the sympathy strike was called in accordance with ALPA's longstanding practice and procedures and that they considered the pilots who crossed ALPA picket lines to be scabs because they abandoned the ALPA sympathy strike, took the jobs of striking pilots and sided with Eastern during the strike. *Id.* Respondents subjective beliefs on these matters were based on their detailed knowledge of ALPA's longstanding practices and the events surrounding ALPA's sympathy strike at Eastern. Hence even if erroneous, they

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[7] The court recited the settled law that a union's interpretation of its own governing documents is entitled to considerable judicial deference, subject to review only if patently unreasonable or adopted in bad faith, and concluded that judicial deference was particularly appropriate in this case where ALPA's interpretation is consistent with longstanding past practice, where most pilots participated in the leadership-called strike, where the pilots subsequently voted in August 1989 to continue the strike and where the ALPA's constitution granted its Board (which promulgated the Administrative Manual) authority to resolve disputes. APP. 22-23.

would not have acted in reckless disregard of the truth. *Id.* None of these findings merit Supreme Court review.

The separate petition of Joseph S. Norman, II presents no compelling basis for Supreme Court review. Norman's argument that partial federal labor preemption of state labor law does not apply in this case because the scab list was published after the termination of the sympathy strike (Norman Pet. 5) is contrary to the Court's decision *Letter Carriers*, 418 U.S. at 264, where in the absence of a strike or even a representation campaign, the Court ruled that the doctrine applied. *Id.* at 280. The Court explained that the application of partial preemption "obviously cannot depend on some abstract notion of what constitutes a labor dispute" but, instead, must turn on "whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are sufficiently implicated." *Letter Carriers*, 418 U.S. at 279. Those policies are clearly implicated in this dispute, and Norman presents no basis for the Court to revisit this settled law here.

Norman's argument that the "scab" designation is false as to him because he did not "work" for Eastern during the sympathy strike (Norman Pet. 8-9) likewise does not merit Supreme Court review. It is undisputed that Norman accepted employment as a DC-9 Captain and received compensation and pilot training from Eastern during the strike. APP. 31. The appeals court properly ruled that he was thus "working" for Eastern in the ordinary sense of the term and that it is this colloquial meaning of the word, and not his legal classification under the Railway Labor Act, that is relevant in determining falsity in this libel case. *Id.* This holding is in complete accord with the Court's opinions in *Letter Carriers*, *Linn* and *Bresslers*, as already discussed above. *See supra* at 9.

Norman's claim of his missing affidavit (Norman Pet. 6-8) does not merit Supreme Court review. Norman merely shows

that the district judge did not have his affidavit on the day of oral argument, not that it was never received or considered by the district court. Moreover, the information Norman presents is superfluous since Norman admits that he crossed ALPA's picket lines, accepted pilot employment, and received compensation and pilot training at Eastern during the sympathy strike. APP. 31. Norman's argument, unique to him, does not merit Supreme Court review.

Finally, Norman's argument based on Section 8(c) of the of the National Labor Relations Act, 29 U.S.C. §158(c), (Norman Pet. 9-10) is meritless since the Railway Labor Act, not the NLRA, applies in this case. *See* 29 U.S.C. §152.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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